IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

WEDNESDAY, THE 21ST FEBRUARY 2007 / 2ND PHALGUNA 1928

CRP.No. 1119 of 2002()

AGAINST THE ORDER DATED 14/06/2002 IN EA 215/02 IN OS.140/1984 of ADDL.MUNSIFF COURT,CHERTHALA

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REVN. PETITIONER: REVN. PETITIONER/PETITIONER/JUDGEMENT DEBTOR

M.K. NATARAJAN, S/O. KARUMBAN,
THATHAMKULANGARA VELIYIL, PERUNNERMANGALAM MURI,
MARARIKULAM NORTH VILLAGE, CHERTHALA.

BY ADV. SRI.ROY CHACKO
SRI.JOBY CYRIAC

RESPONDENTS: RESPONDENT/COUNTER PETITIONERS/DECREE HOLDERS:

1. SUMATHY MOTHER OF 1ST PLAINTIFF,
VELLAPPALLIL, PERUNNERMANGALAM MURI,
MARARIKULAM NORTH VILLAGE, CHERTHALA.

2. RANI LARRY, W/O. LARRY MOHANDAS DO.

3. POORNA LARRY OF DO. MINOR.

4. PRANEV OF DO. MINOR.

5. HARI MOHANDAS, S/O. MURALI MOHANDAS OF
DO. DO. GUARDIAN OF MINOR 3 AND 4 IS
2ND RESPONDENT.

BY ADV. SRI.KURIAN GEORGE KANNAMTHANAM
SRI.R.REMESH
SRI.LIJU. M.P

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON CMP.NO.2881/2002 IN CRP.NO.1119/2002

DISMISSED

21/2/2007

Sd/-
P.R.RAMAN, JUDGE.

P.R.RAMAN,J.

C.R.P.NO.1119 OF 2002

Dated this the 21st day of February, 2007

O R D E R

Petitioner is an applicant in E.A.No.215/02 in O.S.No.140/84 on the file of the Additinal Munsiff's Court, Cherthala. The applicant sought for stay of the delivery proceedings. It was contended that the decree schedule property and the petitioner's property are lying contiguous without any demarcation. It is contended among other things that the Amin visited the property on 7/6/01 for the purpose of effecting delivery of possession and after seeing the property he has stated that in view of the fact that the property belonging to the petitioner is lying contiguous with the decree schedule property, it is necessary to appoint a Surveyor. It is

his contention that since the property is lying contiguous with the decree schedule property, unless a Surveyor is appointed it will adversely affect his interest and that a portion of the property beyond the fence on the western side is attempted to be taken away. The court below as per the order impugned in this revision, dismissed the application solely on the ground that the present application is barred by principles of res judicata. According to the court below, the petitioner earlier preferred an E.A.No.982/2000 for getting stay of execution till the disposal of O.S.No.1203/99 pending before the Munsiff's Court, Alappuzha for demarcation of the boundaries. In the application, (E.A.No.982/00) the identity of the properties were also raised by the petitioner. That application was heard and disposed of against which C.R.P.No.1272/01

was filed before this Court and this Court confirmed the said order and dismissed the C.R.P. E.A.No.200/02 was filed by the petitioner for staying the delivery proceedings till the disposal of O.S.No.1203/99, which also is claiming similar relief. It is thereafter that the present petition is filed and therefore the same is barred by principles of res judicata. The correctness of this finding is separately challenged by the petitioner herein. E.A.No.982/2000 was filed by the petitioner under Order 21 Rule 29 of the C.P.C. for staying the proceedings in E.P.No.422/98 in O.S.No.140/84 until the final disposal of O.S.No.1203/99 pending before the Munsiff's Court, Alappuzha. The order dated 10th April, 2001 produced as Annexure-A in C.M.P.No.2881/2002 shows that the said application was dismissed holding that the

application under Order 21 Rule 29 of the C.P.C is not sustainable, since the suit was pending before the Munsiff's Court, Alappuzha and in order to attract Order 21 Rule 29, it is necessary that the proceedings must be pending before the same court. A reference was also made in the decision of the Apex Court in **Shaukat Hussain v. Bhuvaneswari Devi (AIR 1973 SC 528).** Since the proceedings in execution as well as the other suit are pending before the same court, the petition under Order 21 Rule 29 of the C.P.C. is not maintainable. It is true that subsequent application, namely, E.A.No.200/02, was filed on similar lines and therefore the same was also rightly dismissed as barred by principles of res judicata. But the present application was filed inter alia seeking demarcation of the property. According to the petitioner, the properties

are lying contiguous with the decree schedule property. Whether or not the properties are lying contiguous and whether the Amin had reported earlier that a Survey is required are however not matters considered by the court below. It is true that there cannot be any objection in execution of the 'decree' passed by the civil court and taking delivery of the decree schedule property. But the question is as to whether the property has been rightly identified. The only contention raised by the petitioner is that there is a fence on the western side of the decree schedule property, which separates the property of the petitioner from the decree schedule property. There cannot be any objection in taking delivery of the property upto the fence on the western side. However, if any portion of the decree schedule property exceeds beyond the fence, demarcation of the boundary may be necessary

as according to the petitioner, it will adversely affect his interest. This is an aspect which is required to be considered. It cannot be said that the present application is therefore barred by principles of res judicata. In order to prevent miscarriage of justice, it is necessary that the order in E.A.No.215/2002 passed by the Additional Munsiff's Court, Cherthala is liable to be set aside in exercise of the power under Article 227 of the Constitution of India. I do so.

2. In result, the C.R.P. is allowed and the matter is remitted to the execution court for fresh consideration of E.A.No.215/02 and pass appropriate orders on merits, after hearing both sides.

P.R.RAMAN,
Judge.

kcv.

P.R.RAMAN, J.

C.R.P.NO.1119 OF 2002

O R D E R

21st February, 2007